



18DHR 04694

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September 23, 2019

FILED

2019 SEP 25 PM 12:49

OFFICE OF ADMIN HEARINGS

VIA CERTIFIED U.S. MAIL

Adrian W. Dillinger
Asst. Attorney General
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VIA CERTIFIED U.S. MAIL

Lisa G. Corbett
Department of Health and Human Services
Office of Legal Affairs
Adams Building
2001 Mail Service Center
Raleigh, NC 27699-2001

Re:

Dear Counselors,

Enclose please find for service upon you, Petitioner's Petition for Judicial Review that was filed today with the Wake County Clerk of Superior Court.

With best wishes, I am

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Todd S. Yoho'.

Todd S. Yoho
Paralegal

Enclosures

cc: The Office of Administrative Hearings

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS _____

2019 SEP 23 P 12:05
NEW HORIZON GROUP HOME, LLC,)

WAKE CO., C.O.C.)

Petitioner,)

BY)

(G)

v.)

N.C. DEPT. OF HEALTH AND HUMAN)
SERVICES, DIVISION OF HEALTH)
SERVICES REGULATION,)

Respondent.)

)

)

PETITION FOR JUDICIAL REVIEW

OFFICE OF ADMIN HEARINGS

2019 SEP 25 PM 12:49

FILED

NOW COMES Petitioner, New Horizon Group Home, LLC (“Petitioner”), by and through counsel, hereby files this Petition for Judicial Review and Application to Present Additional Evidence pursuant to N.C. Gen. Stat. §150B-43 and 49. In support of said Petition for Judicial Review challenging a Final Agency Decision entered by the Office of Administrative Hearings (“OAH”), on August 22, 2019, (“Final Decision,” attached hereto as Ex. 1), Petitioner states as follows:

INTRODUCTION

1. Petitioner seeks judicial review of the Final Decision because it erroneously found in favor of Respondent. Petitioner respectfully requests (1) reversal of the Final Decision, (2) an Order granting Summary Judgment in favor of Petitioner, and (3) stay of the operation of the Final Decision pending the outcome of the review. In the alternative, Petitioner respectfully requests (1) reversal of the Final Decision; (2) remand to the OAH for additional evidence and a hearing on the merits; and (3) stay of the operation of the Final Decision pending the outcome of the review.

PARTIES AND JURISDICTION

2. Petitioner is a group home that provides Medicaid, residential level IV services to male, minor children ages 9 - 17 from Lumberton and the surrounding areas.

3. Respondent North Carolina Division of Health Services Regulations (“Respondent” or “DHSR”), oversees medical, mental health and adult care facilities, emergency medical services, and local jails.

4. Pursuant to N.C. Gen. Stat. §150B-43, this Court has personal jurisdiction over the parties in this action.

5. Pursuant to N.C. Gen. Stat. §150B-43, this Court has subject matter jurisdiction because it seeks judicial review of a Final Decision that was issued pursuant to N.C. Gen. Stat. §150B-34.

6. Through the initiation of a contested case before an Administrative Law Judge (“ALJ”) and the subsequent Final Decision pursuant to N.C. Gen. Stat. §150B-34, Petitioner has exhausted its administrative remedies and is entitled to judicial review under N.C. Gen. Stat. §150B-43.

7. This Petition for Judicial Review is filed in accordance with the requirements of N.C. Gen. Stat. §150B-45 and §150B-46 and seeks remedies available to Petitioners under N.C. Gen. Stat. §150B-51.

PRODECURAL HISTORY OF THIS CONTESTED CASE

8. Petitioner is a North Carolina company owned and operated by Ms. Barbara Brockington. Tr. Vol. I, p. 27, ll 21-023. At the time of the suspension, Petitioner had been in business for approximately 14 years. Tr. Vol. I, p. 27, ll 24-25.

9. It consists of a Residential Level III, § .1700; Residential Level IV, § .1800; and Day Treatment, two SAIOP/SACOT for two locations - Wadesboro and Rockingham, North Carolina. Tr. Vol. I, p. 28, ll 5-9.

10. All four licenses were terminated or refused to be re-certified. The Hearing Officer found that the Residential Level III, (MHL-004-033) § .1700 and the two Day Treatment two SAIOP/SACOT licenses must be re-instated, and found that Respondent's decision to deny Petitioner's renewal of facility licenses MHL # 077-077, MHL # 004-040, and MHL # 047-091 is **reversed**.

11. Therefore, the only license at issue on Judicial Review is the Residential Level IV, § .1800, which license was (1) summarily suspended; (2) penalized with three Type A-1 violations; and (3) revoked.

Summary Suspension

12. In a Summary Suspension, dated April 11, 2018, DHSR informed Petitioner that based on the findings from the April 13, 2018, Survey by Respondent and the information documented in the April 11, 2018, Report for Record, effective by 5:00pm that same night (April 11, 2018), that all group home residents must be discharged, regardless of whether the minor children had an appropriate place to which be released. In fact, at the time of the summary suspension, only two, level IV group homes existed in North Carolina, one of which was Petitioner. The only other level IV group home in North Carolina did not accept males and was at full capacity. Therefore, all Petitioner's residents were inappropriately and dangerously released to their respective guardians, despite the fact that medical professionals opined that home placement was unsuitable for these children and that a level IV group home placement was medically necessary.

13. According to the Summary Suspension, the Summary Suspension was implemented because the public health, safety or welfare requires emergency action. N.C. Gen. Stat. § 150B-3(c).

14. On April 11, 2018, during the Summary Suspension, there was no avenue to appeal the findings, despite the fact that the 4th Circuit Court of Appeals has held that Medicaid providers have a property right to continued participation in the Medicaid program and that due process is required before that property right is usurped. *K.C. v. Shipman*, 716 F.3d 107 (4th Cir. 2013).

15. Petitioner's level IV group home went out of business April 11, 2018, prior to any due process.

Type A-1 Violations

16. In a Notice of Type A-1 Penalties, dated April 26, 2018, DHSR informed Petitioner that as a result of an on-site review, which began April 5, 2018, and lasted only two days, DHSR was implementing three, Type A-1 penalties.

17. According to the Notice of Type A-1 Penalties, the Type A-1 penalties were implemented because the public health, safety or welfare requires emergency action. N.C. Gen. Stat. § 150B-3(c).

18. Specifically, the Hearing Officer ruled that Petitioner failed to comply with 10 NCAC 27G.1801 in that the failures identified resulted in serious neglect of residents. N.C. Gen. Stat. §122C-24.1(a)(1).

19. Despite the Hearing Officer's findings, the law affords providers an opportunity for a Plan of Correction to ameliorate any alleged deficiencies, and Petitioner was not afforded a meaningful Plan of Correction ("POC").¹ NCGS §150B-3(b) ("In either case, the licensee shall be

¹ Petitioner did draft a comprehensive Plan of Correction and submitted the POC to Respondent. From testimony at the hearing and the deposition of Ms. Stephanie Gilliam, it became apparent that Ms. Gilliam never reviewed the

given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.”).

20. Respondent failed to review Petitioner’s POC and failed to return for a follow-up visit to determine whether Petitioner had complied with all lawful requirements for retention of license.

21. The Hearing Officer was further incorrect in finding that Petitioner’s Type A-1 violations should be upheld. The Hearing Officer was incorrect in finding that Petitioner violated 10A NCAC 27D. 0304 by failing to protect two of five residents against serious harm or abuse by staff of the facility.

22. The Hearing Officer was incorrect in finding that Petitioner violated 10A NCAC 27E. 0101 by failing to provide services that promoted a safe and respectful environment, including using the least restrictive and most appropriate setting and methods in nine specifically enumerated violations of rules.

23. The Hearing Officer was incorrect in finding that Petitioner violated 10A NCAC 27G. 1801 by failing to meet the scope of the license for an intensive residential treatment facility identified to provide intensive treatment and supervision in the residential setting in thirteen specifically enumerated violations of rule or statute.

24. 10A NCAC 22N .0102, which states that “Each provider shall sign a participation contract agreement with the Division of Medical Assistance and shall not be reimbursed for services rendered prior to the effective date of the participation agreement.” Petitioner has a signed participation agreement with DMA. The services at issue were rendered after the participation

POC. Without question, Respondent never conducted a follow-up onsite visit to determine whether the alleged deficiencies were addressed and fixed.

contract agreement was executed with DMA. Therefore, the Hearing Officer's finding that Petitioner violated 10A NCAC 22N .0102 is in error.

Suspension of Admissions

25. In a Notice of Suspension of Admissions, dated April 26, 2018, DHSR informed Petitioner that as a result of an on-site review, which began April 5, 2018, and lasted only two days, DHSR was implementing a suspension of admissions.

26. According to the Notice of Suspension of Admissions, the suspension was being implemented because Petitioner had "failed to comply with the provisions of North Carolina General Statute" including: 10A NCAC 27G .1801 – Scope, 10A NCAC 27G .1802 – Requirements of Licensed Professionals, 10A NCAC 27G .1803 – Requirements of Qualified Professionals, 10A NCAC 27G .1804 – Minimum Staffing Requirements, 10A NCAC 27G .1805 – Operations, 10A NCAC 27G .0202 – Personnel Requirements, 10A NCAC 27G .0205 – Assessment and Treatment/Habilitation or Service Plan, 10A NCAC 27G .0207 – Emergency Plans and Supplies, N.C. Gen. Stat. § 131E-256(D2) – HCPR-Prior Employment Verification, N.C. Gen. Stat. § 131E-256(D2) – HCPR-Notification, Allegations & Protection, 10A NCAC 27G .0209 – Medication Requirements, 10A NCAC 27G .0603 – Incident Response Requirements, 10A NCAC 27G .0604 – Incident Reporting Requirements, 10A NCAC 27D .0103 – Search and Seizure Policy, 10A NCAC 27D .0304 – Protection from Harm, Abuse, Neglect or Exploitation, 10A NCAC 27E .0101 – Least Restrictive Alternative, 10A NCAC 27E .0104 – Seclusion, Physical Restraint and Isolation Time-Out and protective Devices used for Behavioral Control, 10A NCAC 27E .0107 – Training on Alternatives to Restrictive Interventions, 10A NCAC 27E .0108 – Training in Seclusion, Physical Restraining & Isolation/Time-Out, 10A NCAC 27G .0303 – Facility and Grounds Maintenance, and 10A NCAC 27G .0304 – Minimum Furnishings.

27. According to the Notice of Type A-1 Penalties, the Type A-1 penalties were implemented because the public health, safety or welfare requires emergency action. N.C. Gen. Stat. § 150B-3(c).

Revocation

28. In a Notice of Revocation, dated April 26, 2018, DHSR informed Petitioner that as a result of an on-site review, which began April 5, 2018, and lasted only two days, DHSR was revoking Petitioner's Level IV, § .1800 license.

29. According to the Notice of Revocation, the revocation was being implemented because of the onsite findings that instigated the summary suspension.

Reconsideration Reviews

30. Petitioner timely requested a Reconsideration Review of the Summary Suspension.

31. On May 16, 2018, the first Reconsideration Review was held regarding DHSR's Type A1 penalties, its Suspension of Admissions, its Intent for Revocation, and the April 11, 2018, Summary Suspension.

32. Petitioner timely requested a second Reconsideration Review.

33. On June 27, 2018, the second Reconsideration Review was held regarding DHSR's Notice of Revocation.

34. On May 14, 2018, and May 24, 2018, Petitioner filed Petitions for Contested Case Hearings with the Office of Administrative Hearings ("OAH") preserving its right to appeal.

35. In a Reconsideration Review Decision dated June 1, 2018, DHSR informed Petitioner that it was upholding its Type A1 penalties, its Suspension of Admissions, its Intent for Revocation, and the April 11, 2018, Summary Suspension.

36. In a Reconsideration Review Decision dated June 6, 2018, DHSR informed Petitioner that it was upholding its Notice of Revocation.

37. On July 31, 2018, Petitioner voluntarily dismissed without prejudice its May 14th, 2018, and May 24, 2018, Petitions for Contested Case Hearing.

38. On July 31, 2018, Petitioner filed a Petition for Contested Case Hearing consolidating DHSR's adverse agency actions against it into one matter.

39. On August 22, 2019, the ALJ issued a Final Decision in favor of Respondent DHSR.

40. Specifically, the Hearing Officer ruled that Petitioner failed to comply with the licensure statutes and rules and presented an imminent danger to the health, safety, and welfare of the clients and an emergency action was required by Respondent to protect the clients.

REQUEST FOR JUDICIAL REVIEW

1. Petitioner excepts to Findings of Fact 16 - 17, 19 – 45, 49 – 61, 63 – 65, 67 – 69, 71, 73, 75 – 93 and 97 in the Final Decision as affected by error of law, in excess of statutory authority, unsupported by substantial evidence, and/or arbitrary, capricious, and an abuse of discretion.

2. Petitioner also excepts to Conclusions of Law 4, 9 – 17, 19 – 20, 22 – 23, 25 – 27, 31 – 33, and 37 in the Final Decision as affected by error of law, in excess of statutory authority, unsupported by substantial evidence, and/or arbitrary, capricious, and an abuse of discretion.

3. Accordingly, Petitioner seeks a partial reversal of the Final Decision, specifically Petitioner seeks to reverse Respondent's April 11, 2018, decision to summarily suspend Petitioner's license to operate, to suspend Petitioner's admissions on April 26, 2018, to revoke

Petitioner's license to operate the facility on June 1, 2018, and the imposition of the Type A1 penalties on April 26, 2018.

STAY OF DECISION

4. Petitioner further applies that this Court Order a Partial Stay of Decision per N.C. Gen. Stat. §150B-48, staying the operation of the administrative decision, only as to it applies to Petitioner's level IV, § .1800 license, pending the outcomes of the review.

5. Respondent is attempting to deprive Petitioner of property in excess of the statutory authority or jurisdiction of Respondent, other errors of law, as well as unsupported by substantial evidence, arbitrary, capricious, and/or an abuse of discretion.

6. In the Final Decision, the ALJ has exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule as to the decisions germane to Petitioner's level IV, § .1800 license.

7. Petitioner will likely succeed on the merits of the Petition, in light of the additional evidence and testimony to be presented by brief and oral argument.

8. The ALJ, incorrectly, upheld Respondent's decision to summarily suspend Petitioner's license to operate, to suspend Petitioner's admissions on April 26, 2018, to revoke Petitioner's license to operate the facility on June 1, 2018, and the imposition of the Type A1 penalties on April 26, 2018.

9. As discussed above, N.C. Gen. Stat. § 150B-3(c) states that “[b]efore the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the

provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.” (emphasis added).

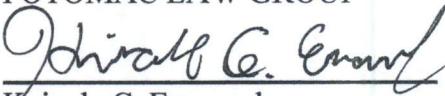
10. Petitioner was not given an opportunity to show compliance with all lawful requirements because Respondent admitted to failing to review the POC submitted by Petitioner.

WHEREFORE, Petitioner prays that this Honorable Court:

1. Partially reverse the Final Decision and find in favor of Petitioner;
2. Stay the operation of the Final Decision pursuant to N.C. Gen. Stat. §150B-52 pending the outcome of this review; and
3. Award Petitioner attorneys' fees for bringing this action;
4. Such further and other relief as this Court may deem appropriate.

Respectfully submitted, this the 23rd day of September, 2019.

POTOMAC LAW GROUP


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BY
BY
WITH EXPRESS PERMISSION
OF AND FOR
KNICOLE C. EMANUEL

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing pleading was served on the following parties by Certified United States Mail, postage prepaid, and addressed to:

Adrian W. Dillinger
Asst. Attorney General
N.C. Dept. of Justice
P.O. Box 629
Raleigh, NC 27602
Counsel for Respondent DHHS
In the Underlying Administrative Matter

Lisa G. Corbett
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NC DHHS Service of Process Agent

This the 23rd day of September, 2019.

POTOMAC LAW GROUP

Nicole C. Emanuel

BY ^{TSY}

WITH EXPRESS PERMISSION
OF AND FOR
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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 DHR 04694

<p>New Horizon Group Home LLC Petitioner, v. NC Department of Health and Human Services, Division of Health Service Regulation Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on February 21, 2019, March 25-26, 2019, and May 23, 2019 in the Office of Administrative Hearings in Raleigh, North Carolina and on March 7, 2019 in Fayetteville, North Carolina.

PROTECTIVE ORDER

Any information related to residents, including their names, mentioned in this proceeding shall be considered confidential and is used for the sole purpose of findings in this proceeding alone and is not properly disclosed in any other setting or hearing.

APPEARANCES

For Petitioner: Knicole Carson Emanuel, Esq.
Potomac Law Group, PLLC

For Respondent: Adrian W. Dellinger, Assistant Attorney General
Derek L. Hunter, Assistant Attorney General
North Carolina Department of Justice

ISSUES

Whether Respondent deprived Petitioner of property; otherwise substantially prejudiced Petitioner's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law when Respondent summarily suspended Petitioner's license to operate on April 11, 2018, suspended Petitioner's admissions on April 26, 2018, revoked Petitioner's license to operate the Facility on June 1, 2018, and imposed three Type A1 penalties on April 26, 2018.



APPLICABLE LAW

N.C. Gen. Stat. § 150B-23(f)
N.C. Gen. Stat. § 122C, Art. 1, 2, 3, & 3A
10A NCAC Ch. 27D, 27E, & 27G

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits 1-5, 7-8, 10-11, 16-23, 25-31, 37, 38 (pps. 8-71), 39-41, and 43-44 were admitted into the record. Exhibits specifically marked "Confidential" are: Exhibits 10, 20, 25-29.

Respondent's Exhibits 1-13, 15-17, 19-28, and 32 were admitted into the record.

WITNESSES

For Petitioner:	Barbara Brockington Sharon Knotts Sheila Lee Thomas McMillian
For Respondent:	Gloria Locklear Stephanie Gilliam

PROCEDURAL HISTORY

This contested case was initiated by the filling of the contested case petition on July 31, 2018. Petitioner filed an Amended Petition on February 1, 2019 and a Second Amended Petition on February 18, 2019. Petitioner had been served by certified mail with a letter dated January 18, 2019, informing her that the licenses of four centers owned and operated by Petitioner were being revoked. Those four facilities license numbers are: MHL # 004-33; MHL # 004-040; MHL # 077-077; MHL # 047-091. Petitioner had also been served with the notice of revocation of the license for its Level IV facility. The amendments were allowed without objection from Respondent so that all matters concerning all five facilities owned and operated by Petitioner could be resolved in this contested case hearing.

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. The Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness; any interest, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner, New Horizon Group Home, LLC, ("Petitioner" or "New Horizon") is a North Carolina company owned and operated by Ms. Barbara Brockington. Tr. Vol. I, p. 27, ll 21-23. At the time of the contested case petition, Petitioner had been in business for approximately 14 years. Tr. Vol. I, p. 27, ll 24-25.

2. It consists of a Residential Level III, § .1700; Residential Level IV, §.1800; and Day Treatment SAIOP/SACOT for two locations – Wadesboro and Rockingham, North Carolina. Tr. Vol. I, p. 28, ll 5-9.

3. Although the licensure of all New Horizon facilities is in question, the primary focus is on the Level IV residential facility (the "Facility"). The Facility, license number MHL-078-318, is located at 210 West Fayetteville Street, Highway 71, Lumber Bridge, North Carolina.

4. A group home is a residential facility in which the clients, in this case, children, have around the clock supervision. Level I is for the least severe and Level IV is for the most severe. Most of Petitioner's clients are on Medicaid, and the Department of Health and Human Services (DHHS) or a Division thereof defines the criteria for Levels I, II, II, and IV. *See* 10A NCAC 27G.

5. At all times relevant to this matter, the Facility was licensed to provide Intensive Residential Treatment for Children or Adolescents pursuant to 10A NCAC 27G .1800.

6. Petitioner's Level IV group home was licensed for 9 children in November 2017. The first client came to reside there February 23, 2018. Tr. Vol. I, p. 29, ll 9-10.

7. Prior to April 11, 2018, only two Level IV group homes existed in the state. Tr. Vol. V, p. 776, ll 1-5. This Facility was one of the two Level IV homes.

8. Respondent, North Carolina Department of Health and Human Services, Division of Health Service Regulation ("DHSR" or "Respondent") is responsible for licensing and regulatory oversight of about 3,000 day and residential facilities in North Carolina for individuals with mental illness, substance use disorder, and intellectual or developmental disabilities. Tr. Vol. V, p. 752, ll 14-18.

9. N.C. Gen. Stat. § 122C-1 *et seq.* authorizes Respondent to license, inspect, and regulate mental health facilities in the State of North Carolina.

10. Ms. Stephanie Gilliam is the Section Chief of DHSR Mental Health Licensure and Certification. Tr. Vol. V, p. 753, ll 16-18.

11. As Section Chief, Ms. Gilliam managed and oversaw Respondent's operations and enforced the law and rules applicable to mental health facilities in North Carolina. Ms. Gilliam was responsible for taking any necessary administrative actions that are permitted by law and

supported by information gathered from facility surveys and investigations. Ms. Gilliam is a licensed clinical social worker.

12. At all times relevant to this case, Gloria Locklear was employed as a Facility Compliance Consultant I by Respondent. Ms. Locklear has been employed in this capacity for thirteen years.

13. As part of her duties as a facility survey consultant, Ms. Locklear conducts annual, complaint, and follow-up surveys of mental health facilities to ensure a facility's compliance with licensure rules. Ms. Locklear is a social worker and has received training from Respondent in survey process and protocol.

Surveys and Citations of Non-Compliance

14. On March 5, 2018, Ms. Locklear began a survey at the Facility. During the survey, Ms. Locklear interviewed staff and residents, observed the condition of the facility, observed the dispensing of medications, and reviewed records, including medical and mental health records, and medication administration reports.

15. On arrival at the Facility, Ms. Locklear inquired of who was in charge of the Facility. Monte Little was represented as the Clinical Director or Director of the Facility at that time. She asked Mr. Little to complete a preprinted form listing the entire staff and a list of clients. (R Ex. 12) Mr. Little stated that he had only been working at the Facility for approximately a week. Petitioner Ms. Brockington appeared at the Facility not long after Ms. Locklear arrived and was present for the rest of the survey.

16. On the first day at the Facility, Ms. Locklear conducted a walk thru. She observed a time-out room and noticed some shoes in the room. Mr. Little directed that they should be removed and that personality should not be left in the room.

17. The time-out room had a lock on the door, which was concerning to Ms. Locklear. Time-out rooms are permissible in some conditions as provided in 10A NCAC 27E .0104(8); however, they must be approved by the Construction Section of DHHS. The time-out room in this Facility had not been approved by the Construction Section. (R. Ex. 29)

18. Ms. Locklear completed the annual and complaint survey at the Facility on April 13, 2018. As a result of that survey, Ms. Locklear completed a Statement of Deficiencies ("SOD"). The Statement of Deficiencies contains 116 pages. (R Ex. 1)

19. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for standard deficiencies in the following rule areas:

- a. 10A NCAC 27G .0207, for failing to have required fire and disaster drills as required.
- b. 10A NCAC 27G .0304(d)(7), for failing to provide minimum furnishings for clients' bedrooms.

Type A1 Penalties

20. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a Type A1 violation of 10A NCAC 27G .1801. Petitioner failed to meet the scope of the license for an intensive residential treatment facility identified to provide intensive treatment and supervision in the residential setting. Specifically:

- a. The Facility failed to ensure staff were trained for MH/DD/SAS (Mental Health/Developmental Disabilities/Substance Abuse Services) needs of the clients as required by 10A NCAC 27G .0202.
- b. The Facility failed to develop and implement strategies based on an assessment of the client as required by 10A NCAC 27G .0205.
- c. The Facility failed to ensure that medications were only administered by unlicensed persons trained by a registered nurse, pharmacist, or other legally qualified person and privileged to prepare and administer medications and as ordered by the physician and maintain an accurate MAR as required by 10A NCAC 27G .0209.
- d. The Facility failed to access the Health Care Personnel Registry (HCPR) prior to hiring four staff members as required by N.C. Gen. Stat. § 131E-256.
- e. The Facility failed to report allegations of abuse or neglect to the Health Care Personnel Registry (HCPR) and to investigate alleged acts of abuse or neglect as required by N.C. Gen Stat. § 131E-256(g).
- f. The Facility failed to request a criminal background check for staff within five business days of making the conditional offer of employment as required by N.C. Gen. Stat. § 122C-80.
- g. The Facility failed to have at least one full time licensed professional (LP) providing the required clinical and administrative duties related to client services as required by 10A NCAC 27G .1802.
- h. The Facility failed to have at least one full time qualified professional (QP) providing the required clinical and administrative duties related to client services as required by 10A NCAC 27G .1803.
- i. The Facility failed to ensure that the minimum number of staff were available in the facility to meet the clients' assessed needs as required by 10A NCAC 27G .1804.
- j. The Facility failed to ensure the educational services were made available to meet the clients' needs as required by 10A NCAC 27G .1805.

k. The Facility failed to implement policies and to document their response to a level III incident as required by 10A NCAC 27G .0603.

l. The Facility failed to ensure critical incident reports were submitted to the Local Management Entity (LME)/Managed Care Organization (MCO) within 72 hours as required by 10A NCAC 27G .0604.

m. The Facility conducted an unwarranted search and seizure in violation of 10A NCAC 27D .0103.

21. When the failure to obtain criminal background checks and HCPR registry checks before hiring staff was pointed out to Petitioner, Ms. Brockington was surprised and did not know why “the girls” in the office did not get the proper checks. (R Exs. 13, 22)

22. Most of those identified as staff did not have either the HCPR checks or the criminal background checks, or both. Even the director, Monte Little, did not have an HCPR or criminal record check on file. (R Ex. 13)

23. The Facility is required by statute to have both a licensed professional and a qualified professional. The Facilities’ personnel binders did not reflect an LP or QP. Ms. Brockington confirmed that the Facility had neither an LP or QP. (R Ex. 1, p. 35. 36)

24. The form supplied by Mr. Little showing the staff reflects that both the QP and LP positions were vacant. That same form shows that Melba Conley may have been the QP, but she was only employed for a month and had left March 23, 2018. Linda McLaughlin is shown as a teacher, but she was only there for two weeks, leaving March 7, 2018. Thus, by the time the information was given to Ms. Locklear, neither Ms. Conley nor Ms. McLaughlin were still working at the Facility.

25. During the survey Ms. Brockington told Ms. Locklear that there was no QP on staff. When Ms. Lee testified at the contested case hearing and stated that she was at the facility and available to be interviewed is not credible, and simply not true. If there was no QP per the owner, then why would Ms. Lee be there in that capacity? Ms. Locklear specifically remembers the staff to which she was introduced as being the entire staff present and Ms. Lee was not there.

26. During her interview with Ms. Locklear, Ms. Brockington admitted that there was no teacher and that the students did not have Individual Education Plans as required. She told Ms. Locklear that Melba Conley was to be both the QP and the teacher. She stated that Ms. Conley had been identified as the teacher when she opened the facility. Ms. Conley was no longer at the Facility when the survey was being completed.

27. Interviews with both clients and staff showed that there was no therapist and no teacher and that the clients were not receiving any educational instruction. Staff reported that there were no outside activities or recreational activities. Most days, the clients played games or watched TV. There was a schedule of planned events, but it was not followed. (R Ex. 1, p. 51, Ex. 27)

28. The Facility was required to have a minimum of two staff members at all times. At times the Facility would have only one staff member present. The Facility failed to have the minimum staff at all times. Ms. Brockington stated that she was not aware of the requirement. (R Ex. 1, p. 38, Ex. 22)

29. The failure by Petitioner to comply with 10A NCAC 27G .1801 was appropriately cited as a Type A1 violation because the failures identified resulted in serious neglect of residents. N.C. Gen. Stat. § 122C-24.1(a)(1).

30. Ms. Brockington explained that she was not aware of much of what was going on in the center, including the lack of required background checks, use of the time-out room, lack of education or recreation, even though it was ultimately her responsibility.

31. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a Type A1 violation of 10A NCAC 27D .0304. based upon the interviews with both staff and the clients, including interviewing one client while he was still in the hospital. Petitioner failed to protect two of the five residents from serious harm and abuse by staff of the Facility. The failure by Petitioner to comply with 10A NCAC 27D .0304 was appropriately cited as a Type A1 violation because the failures identified resulted in serious harm and abuse of residents. N.C. Gen. Stat. § 122C-24.1(a)(1).

32. Based on her investigation, Ms. Locklear found that Petitioner's failure to comply with the licensing statutes and rules led to serious harm and the serious abuse of residents, including:

- a. On March 31, 2018, staff identified as #9 abused client identified as #7 by grabbing him by the shirt holding him up against a wall and hitting/slapping/choking him.
- b. On another occasion in March of 2018, staff #9 placed client #6 in a hold, which included having the client's arm behind his back and pushed up into his back while staff escorted the client to the unapproved Isolation Time-Out room. Staff #9 was not trained on North Carolina Interventions.
- c. On April 9, 2018, staff #6 abused client #7 by throwing water on him and putting her fingers in his face and pushing him and attempting to hit him with a metal pole. Other staff members had to intervene and "hold her back."

33. Based her investigation, including an interview with Ms. Brockington, Ms. Locklear found that Petitioner failed to ensure staff were trained for MH/DD/SAS (Mental Health/Developmental Disabilities/Substance Abuse Services) to meet the needs of these clients as required by 10A NCAC 27G .0202.

34. Petitioner failed to implement policies and to document their response to any Level III incident. Petitioner failed to submit any critical incidents reports to the Local Management Entity (LME)/Managed Care Organization (MCO) within 72 hours.

35. Petitioner had failed to develop and implement strategies based on an assessment of each child on admission as required. During the survey, Ms. Brockington admitted that "they were working on" getting the assessments updated so that appropriate strategies could be developed.

36. The evidence showed that the unwarranted search and seizure resulted from staff taking an electronic device from a client prior to putting the client into the time-out room.

37. Petitioner had failed ensure that medications were administered appropriately and by the appropriate staff. In one instance, the records were incomplete and did not reflect if Prozac had been picked up from the pharmacy, and if so if it had been administered appropriately.

38. Based on her investigation, Ms. Locklear found that Petitioner's failure to comply with the licensing statutes and rules led to serious harm and the serious abuse of residents, including:

- a. A nine-year old client #3, who has diagnoses of Bipolar Disorder, Posttraumatic Stress Disorder (PTSD), ADHD, Disruptive Mood Disorder, and Encopresis, was placed in an unapproved time-out room and left unattended by staff for at least 15 minutes. Encopresis is a condition wherein the person has difficulty in or is unable to control bowel movements. During time in the time-out room, client #3 smeared feces on the walls. It was the first time he had done any such thing since his arrival.
- b. A 14-year old client #7, who has diagnoses of ADHD, Conduct Disorder, Disruptive Mood Disorder, and Cannabis Use Disorder, was placed in an unapproved time-out room and left unattended by staff for at least 15 minutes.

39. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a Type A1 violation of 10A NCAC 27E .0101. Petitioner failed to provide services/supports which promoted a safe and respectful environment, including utilizing the least restrictive and most appropriate setting and methods. Specifically:

- a. The Facility failed to maintain a time-out/isolation room used for behavioral control in a safe and harm-free manner and according to the required provisions as required by 10A NCAC 27E .0104.
- b. The Facility failed to maintain a time-out/isolation room used for behavioral control to include documentation, notation of client's physical and psychological well-being, rational for use and description of the intervention, debriefing, and planning as required by 10A NCAC 27E .0104.
- c. The Facility failed to maintain a time-out/isolation room used for behavioral control in a safe and harm-free manner and according to the required policy and procedures and the required provisions as an emergency use of a restrictive intervention, approved staff to administer intervention, conduct

assessment, which includes the physical and psychological well-being of the client and obtain a written order for time-out as required by 10A NCAC 27E .0104.

- d. The Facility failed to maintain a time-out/isolation room used for behavioral control in a safe and harm-free manner and according to the required policy and procedures and the required provisions to include periodic observation of at least every 15 minutes, provision to the use of the toilet, documentation in the client record and a facility staff with no other immediate responsibility other than to monitor client who is placed in time-out, provide continuous observation and verbal interaction as required by 10A NCAC 27E .0104.
- e. The Facility failed to maintain a time-out/isolation room used for behavioral control in a safe and harm-free manner and according to the required policy and procedures and the required provisions to include the required documentation, required notification, and order for the use of the restrictive intervention and the written approval of the designee of the governing body as required by 10A NCAC 27E .0104.
- f. The Facility failed to maintain a time-out/isolation room used for behavioral control in a safe and harm-free manner and according to the required policy and procedures and the required provisions to include reviews and reports of any and all restrictive interventions, a regular review by a designee and by the Client Rights Committee and an investigation of any unusual or possible unwarranted patterns of use and documentation log with required information, positive and less restrictive alternatives used or considered and debriefing and planning with the required persons and the negative effects of the restrictive intervention and any impact on the physical and psychological well-being of the client as required by 10A NCAC 27E .0104.
- g. The Facility failed to maintain a time-out/isolation room used for behavioral control in a safe and harm-free manner and according to the required policy and procedures and the required provisions to include, failed to collect and analyzing data on the use of the restrictive intervention, document the type of procedure used and length of time employed, document alternatives considered and effectiveness as required by 10A NCAC 27E .0104.
- h. The facility failed to implement policy to ensure staff members and the Operations Manager/Group Home Manager received initial training in alternatives to restrictive interventions as required by 10A NCAC 27E .0107.
- i. The Facility failed to ensure staff members and the Operations Manager/Group Home Manager received training in seclusion, physical restraint and isolation time-out only by staff who have been trained and demonstrated competence and prior to providing direct care to people with

disabilities as required by 10A NCAC 27E .0108. The evidence also demonstrates that the staff had not been trained to meet the specific needs of these clients as required.

40. Petitioner used the unapproved time-out room, leaving clients unattended by staff for up to at least 15 minutes, on at least 7 different documented occasions. Staff used the room as a punishment and threatened to use the room in an attempt to control and deter behaviors.

41. None of the staff were trained in the use of restrictive interventions, including use of time-out procedures. Ms. Brockington stated during the survey that she was not sure if everyone had been trained on NCI interventions.

42. Ms. Brockington repeatedly stated that the time-out room was not to be used; however, it was used repeatedly. Ms. Brockington also stated repeatedly that she was told the time-out room was not being used. If she was apprised of the child smearing feces on the wall, then she should have been aware that it was during a time-out period for the child. The evidence is that she was aware of the feces smearing since it was raised as a serious issue.

43. The failure by Petitioner to comply with 10A NCAC 27E .0101 was appropriately cited as a Type A1 violation because the failures identified resulted in serious harm and abuse of residents. N.C. Gen. Stat. § 122C-24.1(a)(1).

44. Respondent's citation of a Type A1 violation of 10A NCAC 27E .0101 is supported by both a preponderance of the evidence and clear and convincing evidence. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, and did not act arbitrarily or capriciously when citing the Type A1 violations.

45. The evidence presented in this contested case hearing supports the facts and conclusions as found by Ms. Locklear as she set forth in the Statement of Deficiencies.

Penalties for A1 Violations

46. Pursuant to N.C. Gen. Stat. § 122C-24.1, Respondent is authorized to assess administrative penalties against mental health facilities for violations of relevant federal and State laws, rules, and regulations of adult care homes.

47. At the time the violations at issue in this matter were cited, N.C. Gen. Stat. § 122C-24.1 defined a Type A1 level violation as any violation of law or rules applicable to mental health facilities which results in death or serious physical harm, abuse, neglect, or exploitation. Respondent is required to assess a penalty for any Type A1 violation. The amount to be assessed for a Type A1 violation must be no less than five hundred dollars and no more than ten thousand dollars.

48. N.C. Gen. Stat. § 122C-24.1(f) requires addressing two issues in administrative appeals of penalties: (1) the reasonableness of the amount of the penalty, and (2) the degree to which each factor listed in N.C. Gen. Stat. § 122C-24.1(c) was evaluated.

49. To maintain compliance and consistency, Respondent uses a matrix with a point system for determining when a penalty should be issued and the amount of that penalty. In determining the amount of a penalty, Respondent compares the total points to a rubric. (R Exs. 7-9) This point system and rubric satisfy the requirements of N.C. Gen. Stat. § 122C-24.1(c) & (f).

50. On April 26, 2018, Respondent imposed a penalty of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27G .1801. (R Ex. 10). As found as fact and concluded above, these violations were appropriately cited as a Type A1 violation because the failures identified resulted in serious neglect of residents.

51. A Type A1 violation requires the assessment of an administrative penalty. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when assessing an administrative penalty against Petitioner in the amount of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27G .1801. Considering the facts and circumstances necessitating the Type A1 penalty, the amount of this penalty was reasonable.

52. On April 26, 2018, Respondent imposed a penalty of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27D .0304. (R Ex. 10). As found as fact and concluded above, these violations were appropriately cited as a Type A1 violation because the failures identified resulted in serious harm and abuse of residents.

53. A Type A1 violation requires the assessment of an administrative penalty. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when assessing an administrative penalty against Petitioner in the amount of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27D .0304. Considering the facts and circumstances necessitating the Type A1 penalty, the amount of this penalty was reasonable.

54. On April 26, 2018, Respondent imposed a penalty of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27E .0101. (R Ex. 10). As found as fact and concluded above, these violations were appropriately cited as a Type A1 violation because the failures identified resulted in serious harm and abuse of residents.

55. A Type A1 violation requires the assessment of an administrative penalty. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when assessing an administrative penalty against Petitioner in the amount of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27E .0101. Considering the facts and circumstances necessitating the Type A1 penalty, the amount of this penalty was reasonable.

Agency Actions

56. On or about April 10, 2018, Ms. Gilliam spoke with Ms. Locklear regarding the surveys of the Facility. Ms. Gilliam was informed that Ms. Locklear had found numerous violations of the licensure statutes and rules at the Facility, including problems with the physical plant, medication administration, training and competency of staff, staff qualifications, staff background checks, and resident rights. Based on this information, Ms. Locklear determined that

Petitioner failed to comply with the statutes and rules while operating the Facility and that these failures presented a danger to resident health, safety, and welfare requiring emergency action.

57. On April 11, 2018, Ms. Gilliam ordered a Summary Suspension of the Facility's license (R Ex. 3) based on the findings from the April 13, 2018 Survey by Respondent (R Ex. 1) and the information documented in the Report for Record dated April 11, 2018 (R Ex. 2). Ms. Gilliam was not exactly clear on whether she reviewed the actual reports or received the reports orally; however, her information was consistent with what Ms. Locklear was reporting about the Facility.

58. On April 26, 2018, Ms. Gilliam issued a Suspension of Admissions based on the findings from the April 13, 2018 Survey by Respondent. (R Ex. 4)

59. On April 26, 2018, Ms. Gilliam issued an Intent to Revoke Petitioners' license to operate the Facility based on the findings from the April 13, 2018 Survey by Respondent. (R Ex. 5)

60. On April 26, 2018, Ms. Gilliam issued three (3) Type A1 administrative penalties of Three Thousand Dollars (\$3,000.00) each based on the findings from the April 13, 2018 Survey by Respondent. (R Ex. 10)

61. On June 1, 2018, Ms. Gilliam issued a Notice of Revocation based on the findings from the April 13, 2018 Survey by Respondent. (R Ex. 6)

Summary Suspension

62. Respondent may order the summary suspension of a license for a mental health facility where it finds that the public health, safety or welfare requires emergency action. 10A NCAC 27G .0405(e); *see also* N.C. Gen. Stat. § 150B-3(c).

63. By certified letter dated April 26, 2018, Respondent ordered the summary suspension of Petitioner's license to operate the Facility effective immediately. That action was based on Respondent's finding that "conditions at New Horizon Group Home, LLC. present an imminent danger to the health, safety and welfare of the clients and that emergency action is required to protect the clients." Respondent further found that Petitioner had "failed to be in compliance with Rules for which they are licensed" including: 10A NCAC 27E .0101 – Least Restrictive Alternative, 10A NCAC 27G .1801 – Scope, 10A NCAC 27G .1802 – Requirements of Licensed Professionals, 10A NCAC 27G .1803 – Requirements of Qualified Professionals, 10A NCAC 27G .1804 – Minimum Staffing Requirements, 10A NCAC 27G .1805 – Operations, 10A NCAC 27G .0202 – Personnel Requirements, 10A NCAC 27G .0205 – Assessment and Treatment/Habilitation or Service Plan, 10A NCAC 27G .0209 – Medication Requirements, 10A NCAC 27D .0304 – Protection from Harm, Abuse, Neglect or Exploitation, and 10A NCAC 27E .0104 – Seclusion, Physical Restraint and Isolation Time-Out and Protective Devices used for Behavioral Control. (R Ex. 3)

64. Based on the violations and deficiencies identified during the survey, it is found that Petitioner's failure to comply with the licensure statutes and rules presented an imminent

danger to the health, safety, and welfare of the clients and that emergency action was required by Respondent to protect the clients

65. The preponderance of the evidence supports Respondent's decision to summarily suspend the Facility's license pursuant to N.C. Gen. Stat. § 150B-3(c) and 10A NCAC 27G .0405(e) and Petitioner has failed to meet its burden. Therefore, Respondent did not deprive Petitioner of property; otherwise substantially prejudice Petitioner's rights; exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law by ordering the summary suspension on April 11, 2018.

Suspension of Admissions

66. Respondent may suspend the admission of any new clients to a licensed mental health facility where the conditions of the facility are detrimental to the health or safety of the clients. Respondent must consider "(1) [t]he degree of sanctions necessary to ensure compliance with this section and rules adopted to implement this subsection, and (2) [t]he character and degree of impact of the conditions at the facility on the health or safety of its clients." N.C. Gen. Stat. § 122C-23(g)

67. By certified letter dated April 26, 2018, Respondent ordered Petitioner to suspend all admissions to the Facility effective immediately. That action was based on Respondent's finding that Petitioner had "failed to comply with the provisions of North Carolina General Statute" including: 10A NCAC 27G .1801 – Scope, 10A NCAC 27G .1802 – Requirements of Licensed Professionals, 10A NCAC 27G .1803 – Requirements of Qualified Professionals, 10A NCAC 27G .1804 – Minimum Staffing Requirements, 10A NCAC 27G .1805 – Operations, 10A NCAC 27G .0202 – Personnel Requirements, 10A NCAC 27G .0205 – Assessment and Treatment/Habilitation or Service Plan, 10A NCAC 27G .0207 – Emergency Plans and Supplies, N.C. Gen. Stat. § 131E-256(D2) – HCPR-Prior Employment Verification, N.C. Gen. Stat. § 131E-256(D2) – HCPR-Notification, Allegations & Protection, 10A NCAC 27G .0209 – Medication Requirements, 10A NCAC 27G .0603 – Incident Response Requirements, 10A NCAC 27G .0604 – Incident Reporting Requirements, 10A NCAC 27D .0103 – Search and Seizure Policy, 10A NCAC 27D .0304 – Protection from Harm, Abuse, Neglect or Exploitation, 10A NCAC 27E .0101 – Least Restrictive Alternative, 10A NCAC 27E .0104 – Seclusion, Physical Restraint and Isolation Time-Out and protective Devices used for Behavioral Control, 10A NCAC 27E .0107 – Training on Alternatives to Restrictive Interventions, 10A NCAC 27E .0108 – Training in Seclusion, Physical Restraining & Isolation/Time-Out, 10A NCAC 27G .0303 – Facility and Grounds Maintenance, and 10A NCAC 27G .0304 – Minimum Furnishings. (R Ex. 4)

68. Based on the violations and deficiencies identified during the survey, the undersigned finds that Petitioner's failure to comply with the licensure statutes and rules were detrimental to the health and safety of the residents. This facility was inadequately and wholly ill-prepared to accept and treat these clients with Level IV needs. It is noted that this Facility had only been open a very short period of time and would have passed the inspections and requirements to open but failed miserably once the clients were admitted.

69. The overwhelming evidence supports Respondent's decision to suspend all new admissions to the Facility pursuant to N.C. Gen. Stat. § 122C-23(g).

Revocation of Petitioner's License

70. Respondent may revoke a license to operate a mental health facility where “the Secretary finds that there has been a substantial failure to comply with any provision of this Article or other applicable statutes or any applicable rule adopted pursuant to these statutes.” N.C. Gen. Stat. § 122C-24(a). Respondent shall revoke a license to operate a mental health facility where “such failure to comply endangers the health, safety or welfare of the individuals in the facility.” 10A NCAC 27G .0405(d)(3)

71. On April 26, 2018, Ms. Gilliam issued an Intent to Revoke Petitioner's license to operate the Facility based on the findings from the April 13, 2018 Survey by Respondent.

72. Respondent is required to give written notice to the licensee of the revocation of its license. The licensee shall then have sixty (60) days to appeal the revocation by filing a Petition for Contested Case Hearing with OAH. If the notice of revocation is appealed within that timeframe, the revocation is automatically suspended until a decision on the revocation is made by OAH. 10A NCAC 27G .0405(d).

73. By certified letter dated June 1, 2018, Respondent notified Petitioner that it was revoking its license to operate the Facility. That action was based on Respondent's finding that Petitioner had “failed to comply with the provisions of North Carolina General Statute” specifically, Articles 2 and 3 of Chapter 122C of the North Carolina General Statutes. (R Ex. 6) Respondent's decision was based upon the findings from the April 13, 2018 Survey by Respondent.

74. On July 31, 2018, Petitioner filed a Petition for Contested Case Hearing appealing the notice of revocation. This appeal suspended the revocation of Petitioner's license pursuant to 10A NCAC 27G .0405(d).

75. The violations and deficiencies identified in the April 13, 2018 survey by Respondent are supported by a preponderance of the evidence. Therefore, Respondent correctly determined that Petitioner has substantially failed to comply with the provisions of Articles 2 and 3 of Chapter 122C of the North Carolina General Statutes.

76. Based on the violations and deficiencies identified during the survey, it is found that Petitioner's failure to comply with the licensure statutes and rules endangered the health, safety, and welfare of the residents in the Facility.

77. The preponderance of the evidence supports Respondent's decision to revoke Petitioner's license to operate the Facility pursuant to N.C. Gen. Stat. § 122C-24(a) and Petitioner has failed to meet its burden.

Collateral Issues

78. The issue concerning the missing Non-Disclose File (“NDF”) was of no consequence at the contested case hearing. From the evidence, it seems that the NDF was indeed missing internally within the Department. The concern of Respondent was that it contained all of the information to substantiate the positions that Respondent was taking going toward revocation

of Petitioner's license and without the information they could not prevail at the hearing. Such concern was principally internal; however, in that Petitioner would be entitled to any information that was considered in the actions taken against Petitioner, then Petitioner should be given that information. Ultimately, the information was provided, though late, and the issue was resolved by Order from the Hon. Melissa Owens Lassiter, Administrative Law Judge.

79. Ms. Gilliam's seeming lack of recollection of exactly what she relied on as the ultimate decision-maker is not fatal to this decision. It would be completely unwieldy for any final decision-maker to pour over every document and/or conduct their own investigation before making the decision. The decision-maker of necessity must rely on condensed versions of what the Agency has found in its investigation.

80. The lack of Ms. Gilliam's recollection of the voluminous Plan of Correction ("POC") submitted by Petitioner is concerning, but again, not fatal. The reviewers had determined that the POC did not sufficiently show that all of the necessary corrections had been made. The violations were systemic. The Facility had only been open less than two months and practically everything went wrong. All issues raised by the Statement of Deficiencies should have been anticipated and addressed prior to opening.

81. To have so much go so wrong in such a short period of time is indicative of an inability to effectively operate this Level of a facility. Admittedly, it is difficult to show corrections have been made when admissions have been stopped and the current clients have been removed. However, the Plan of Corrections is speculative and hypothetical, a forecast of what would be done. All the planning and process for initially opening are, to a large degree, the very same thing—a forecast of how the Facility will be run, and in this instance, it did not come to fruition.

Other violations within Statement of Deficiencies

82. The Statement of Deficiencies contains 116 pages. Further findings of deficiencies, other than those set forth herein, have not been addressed nor disputed. Unless specifically addressed herein, such other deficiencies are not considered in this Final Decision. Those deficiencies are sufficient to render this Final Decision.

Credibility

83. In making the foregoing Findings of Fact, credibility has played a significant role. Credibility is defined to a degree in the introduction to the Findings of Fact. In this contested case, the undersigned felt it more important to go into more detail on the issue of credibility although it is not necessary.

84. Much of Petitioner's evidence that was elicited during the contested case hearing is 180-degrees different from information gleaned during the survey. For example, during the survey, Mr. Little and Ms. Brockington confirmed that there was at that time no QP or LP. However, at the hearing, Ms. Brockington offered that there are two QPs—one of whom was on site at the facility during the survey. The evidence in this contested case is replete with other examples of how the evidence at the hearing was contrary to the information gathered by Ms. Locklear.

85. There are different reasons why this information may be so divergent. One such reason is that Ms. Locklear did not hear or understand correctly the information that she was gathering. Therefore, she was erroneously writing down the information throughout the entire process. Ms. Locklear is a veteran and skilled investigator with no known history of such negligent ineptitude.

86. Alternatively, Ms. Locklear could have purposely been falsifying information to intentionally cause problems for Petitioner. However, there is no known animus from Ms. Locklear toward Petitioner, no known personal reasons for Ms. Locklear to create such fiction.

87. Another reason for the divergent stories is that Ms. Brockington, Mr. Little, members of the staff and the clients were all lying to Ms. Locklear during the survey. Such possibility is non-sensical because so many of the statements made were contrary to the interests of Ms. Brockington and to the Facility. It makes no sense to deliberately tell falsehoods to someone who is part of the regulatory system, which can create problems for the Facility, including closing the Facility.

88. The only other possibility is that witnesses for Petitioner, including Ms. Brockington, were not truthful. They are the only ones who stand to gain from completely changing the narrative that was obtained during the survey.

89. It is specifically found as fact that Ms. Brockington was not truthful in her testimony and is, therefore, not credible.

90. It cannot be specifically found as fact that Sharon Knotts was untruthful; however, if in fact the trainings were provided as Ms. Knotts states, then why were there no records of the trainings when the survey was being done? Ms. Brockington even acknowledged that she was not certain of what trainings any staff had. If there were records, Ms. Brockington had ample opportunity during the survey to produce such records.

91. It is specifically found as fact that Ms. Shelia Lee was not truthful and is, therefore, not credible. On the form provided by Mr. Little listing staff, Ms. Lee is identified as a "hab tech." Five lines below Mr. Little indicates that the position of QP is vacant. Ms. Lee took exception with the finding that there was no QP, that the time-out room was being used and that no educational services were being rendered. Several other staff and clients related just the opposite. Ms. Lee varies in her story, stating at one point that she was the QP on the day of the survey then alternatively stating that Melba Conley was the QP. Melba Conley had already left the employ of the Facility by the time of the survey.

92. Dr. Thomas McMillan identified himself as the Clinical Director. He has a Doctor of Arts degree and is not a medical doctor. He states that he has been licensed by the State of North Carolina since 2006 as a licensed professional counselor, but he is not a licensed clinical social worker. He has been in the mental health field for 15 years.

93. Dr. McMillan admits that he only came to be employed by Petitioner after the summary suspension had been issued and there were no clients for him to see. His duties were primarily to review the files of those clients that had been present but were no longer there. He determined that indeed strategies were in the files; however, Ms. Brockington had admitted that the clients had not been assessed for updating their individual plans since arriving at the Facility. Dr. McMillan assisted Ms. Brockington in preparing the corrective action plan and he attended meetings with the Agency.

94. Dr. McMillan was not aware that a time-out room was being used and stated that use of a time-out room for these clients would not be appropriate at any time.

Revocation of Other Centers' Licenses

95. By letters dated January 18, 2019, Petitioner was informed that the licenses for the four other centers that Petitioner owned were revoked for failure to timely renew the applications. No center may be operated in the State of North Carolina without being licensed. The licenses expire at the end of the calendar year and must be renewed yearly.

96. The licenses at issue for renewal are: MHL # 004-33; MHL # 004-040; MHL # 077-077; and MHL # 047-091.

97. While there has been overwhelming evidence that the Level IV facility was a failure, there is no pour-over effect from those facts to whether the license for the four other facilities belong to Petitioner should be granted. When the Department was revoking these four facilities licenses, Petitioner had not been adjudicated of any wrong-doing or failures in operating the Level IV Facility. There is no history or record in this proceeding that demonstrates problems with the other four facilities.

98. A reasonable inference can be drawn from the evidence that indeed the failures of the Level IV Facility did influence the decision-making for the other four facilities. However, the only reason given by Ms. Gilliam for the revocation was timeliness.

99. Petitioner mailed the reapplications and checks by regular United States Postal Service. There is no requirement that the applications be sent certified mail or in any particular manner. Respondent contends that the re-applications and checks were never received. Petitioner contends that the packet was never returned.

100. Petitioner presented evidence that shows that she had properly prepared the re-applications with accompanying checks. All of the re-applications and all of the accompanying checks were dated November 19, 2018. By hand-written notation, all of the applications and checks were mailed together the following day on November 20, 2018.

101. The re-applications had been submitted more than five weeks before they expired. Having not received the renewals, Petitioner called Respondent to inquire. She was told on the phone that the renewals had not been received. She spoke with a supervisor and ultimately with Ms. Gilliam, who requested Petitioner to bring her copies of the re-applications and proof of the checks and willingly provide new checks. Ms. Gilliam informed Petitioner that she was denied and that she had to turn in her licenses.

102. Petitioner's evidence that she timely sent the re-applications and checks is credible. Petitioner stated that she had never missed a deadline in filing for renewal and that has not been contradicted. She stated, however, that there had been some problems in the renewal process and that on occasion, Respondent would be tardy in getting the renewals to the providers. This testimony has not been refuted by Respondent.

103. The unanswerable question is what happened to the applications and checks? Hypothetically, it very well may have been lost internally within Respondent's office just as the NDF was lost. Perhaps, USPS lost it. Without regard to the whereabouts of the missing documents, the question then becomes if Petitioner's licenses are automatically revoked as a matter of law.

104. It is clear that N.C. Gen. Stat. § 122C-23(a) provides that a facility is prohibited from providing services unless duly licensed. N.C. Gen. Stat. § 122C-23(e) states that the license "shall expire at the end of the calendar year." Respondent's rigid enforcement of that provision is problematic. Following the rigid interpretation used against Petitioner in this contested case means that every licensee who has not received their license from the Department at one minute after midnight in the early hours of January 1 is not licensed and must close. That would be true even if their application had been post-marked on or before December 31. Rigid enforcement of that statute, as the Agency has in this case, would mean that only licensees who actually have their license can operate until the licenses are reissued. Obviously, leaving the licensees in such a position is not the intention of the statute.

105. In this case the Agency probably would not have known the issue existed with Petitioner's application but for Petitioner calling the Agency to inquire, something she had done before when the Agency was slow to get the licenses out.

106. N.C. Gen. Stat. § 122C-23(e) provides that a provisional license may be granted to a provider who is "temporarily unable to comply with a rule." The provisional license is for a period not to exceed six months, and during that time the licensee is to correct the noncompliance issue. A simple remedy available to others who find themselves in the same predicament as Petitioner. Petitioner was quite capable of correcting the noncompliance issue, even within perhaps 24 hours by hand delivery. There is nothing in Petitioner's history that would indicate that she was incapable of complying with the requirements for re-licensure. She has presented unrefuted testimony and documentation by clear and convincing evidence that the re-enrollment should be allowed.

CONCLUSIONS OF LAW

To the extent that the foregoing Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. Based upon the foregoing Findings of Fact, and the entire record in this proceeding, the Undersigned makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

3. Petitioner has the burden of proving, by a preponderance of the evidence, that Respondent has substantially prejudiced Petitioner's rights and has exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. § 150B-25.1(a).

4. It is concluded as a matter of law that Petitioner and other testimonial evidence on her behalf are not credible concerning the issues with the Level IV facility. It is important to note that her evidence concerning the remaining four facilities for which she had licenses is unrefuted.

5. Respondent has the burden of proving by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed. N.C. Gen. Stat. § 150B-25.1(b)

6. N.C. Gen. Stat. § 122C-1 *et seq.* authorizes Respondent to license, inspect, and regulate mental health facilities in the State of North Carolina.

7. Ms. Locklear completed an annual and complaint survey at the Facility on April 13, 2018. As a result of that survey, Ms. Locklear completed a Statement of Deficiencies. (R Ex. 1)

8. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a standard deficiency in violation of 10A NCAC 27G .0207 and 10A NCAC 27G .0304(d)(7).

9. Respondent's citation of a standard deficiency in each of the above rule areas is supported by a preponderance of the evidence. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, and did not act arbitrarily or capriciously when citing noncompliance with the licensure statutes and rules.

Type A1 Violations

10. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a Type A1 violation of 10A NCAC 27G .1801. Petitioner failed to meet the scope of the license for an intensive residential treatment facility identified to provide intensive treatment and supervision in the residential setting in thirteen specifically enumerated violations of rule or statute.

11. The failure by Petitioner to comply with 10A NCAC 27G .1801 was appropriately cited as a Type A1 violation because the failures identified resulted in serious neglect of residents. N.C. Gen. Stat. § 122C-24.1(a)(1).

12. Respondent's citation of a Type A1 violation of 10A NCAC 27G .1801 is supported by both a preponderance of the evidence and clear and convincing evidence. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, and did not act arbitrarily or capriciously when citing the Type A1 violation.

13. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a Type A1 violation of 10A NCAC 27D .0304. Petitioner failed to protect two of the five residents from serious harm and abuse by staff of the Facility. The failure by Petitioner to comply with 10A NCAC 27D .0304 was appropriately cited as a Type A1 violation because the failures identified resulted in serious harm and abuse of residents. N.C. Gen. Stat. § 122C-24.1(a)(1).

14. Respondent's citation of a Type A1 violation of 10A NCAC 27D .0304 is supported by both a preponderance of the evidence and clear and convincing evidence. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, and did not act arbitrarily or capriciously when citing the Type A1 violation.

15. The April 13, 2018 Statement of Deficiencies (R Ex. 1) cited Petitioner for a Type A1 violation of 10A NCAC 27E .0101. Petitioner failed to provide services/supports that promoted a safe and respectful environment including utilizing the least restrictive and most appropriate setting and methods in nine specifically enumerated violations of rules.

16. The failure by Petitioner to comply with 10A NCAC 27E .0101 was appropriately cited as a Type A1 violation because the failures identified resulted in serious harm and abuse of residents. N.C. Gen. Stat. § 122C-24.1(a)(1).

17. Respondent's citation of a Type A1 violation of 10A NCAC 27E .0101 is supported by both a preponderance of the evidence and clear and convincing evidence. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, and did not act arbitrarily or capriciously when citing the Type A1 violation.

Summary Suspension

18. Respondent may order the summary suspension of a license for a mental health facility where it finds that the public health, safety or welfare requires emergency action. 10A NCAC 27G .0405(e); *see also* N.C. Gen. Stat. § 150B-3(c).

19. Based on the violations and deficiencies identified during the survey, it is concluded that Petitioner's failure to comply with the licensure statutes and rules presented an imminent danger to the health, safety, and welfare of the clients and that emergency action was required by Respondent to protect the clients.

20. The preponderance of the evidence supports Respondent's decision to summarily suspend the Facility's license pursuant to N.C. Gen. Stat. § 150B-3(c) and 10A NCAC 27G .0405(e) and Petitioner has failed to meet its burden. Therefore, Respondent did not deprive Petitioner of property; otherwise substantially prejudice Petitioner's rights; exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law by ordering the summary suspension on April 11, 2018.

Suspension of Admissions

21. Respondent may suspend the admission of any new clients to a licensed mental health facility where the conditions of the facility are detrimental to the health or safety of the

clients. Respondent must consider “(1) [t]he degree of sanctions necessary to ensure compliance with this section and rules adopted to implement this subsection, and (2) [t]he character and degree of impact of the conditions at the facility on the health or safety of its clients.” N.C. Gen. Stat. § 122C-23(g).

22. Based on the violations and deficiencies identified during the survey, it is concluded that Petitioner’s failure to comply with the licensure statutes and rules were detrimental to the health and safety of the residents.

23. The preponderance of the evidence supports Respondent’s decision to suspend all new admissions to the Facility pursuant to N.C. Gen. Stat. § 122C-23(g) and Petitioner has failed to meet its burden. Therefore, Respondent did not deprive Petitioner of property; otherwise substantially prejudice Petitioner’s rights; exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law by issuing the suspension of admissions on April 26, 2018.

Revocation of Petitioner’s License

24. Respondent may revoke a license to operate a mental health facility where “the Secretary finds that there has been a substantial failure to comply with any provision of this Article or other applicable statutes or any applicable rule adopted pursuant to these statutes.” N.C. Gen. Stat. § 122C-24(a). Respondent shall revoke a license to operate a mental health facility where “such failure to comply endangers the health, safety or welfare of the individuals in the facility.” 10A NCAC 27G .0405(d)(3).

25. As concluded above, the violations and deficiencies identified in the April 13, 2018 Survey by Respondent are supported by a preponderance of the evidence. Therefore, Respondent correctly determined that Petitioner has substantially failed to comply with the provisions of Articles 2 and 3 of Chapter 122C of the North Carolina General Statutes.

26. Based on the violations and deficiencies identified during the survey, it is concluded that Petitioner’s failure to comply with the licensure statutes and rules endangered the health, safety, and welfare of the residents in the Facility.

27. The preponderance of the evidence supports Respondent’s decision to revoke Petitioner’s license to operate the Facility pursuant to N.C. Gen. Stat. § 122C-24(a) and Petitioner has failed to meet its burden. Therefore, Respondent did not deprive Petitioner of property; otherwise substantially prejudice Petitioner’s rights; exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law by issuing the notice of revocation on June 1, 2018.

Type A1 Administrative Penalties

28. Pursuant to N.C. Gen. Stat. § 122C-24.1, Respondent is authorized to assess administrative penalties against mental health facilities for violations of relevant federal and State laws, rules, and regulations of adult care homes.

29. At the time the violations at issue in this matter were cited, N.C. Gen. Stat. § 122C-24.1 defined a Type A1 level violation as any violation of law or rules applicable to mental health facilities, which results in death or serious physical harm, abuse, neglect, or exploitation. Respondent is required to assess a penalty for any Type A1 violation. The amount to be assessed for a Type A1 violation must be no less than five hundred dollars and no more than ten thousand dollars.

30. N.C. Gen. Stat. § 122C-24.1(f) requires addressing two issues in administrative appeals of penalties: (1) the reasonableness of the amount of the penalty, and (2) the degree to which each factor listed in N.C. Gen. Stat. § 122C-24.1(c) was evaluated.

31. On April 26, 2018, Respondent imposed a penalty of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27G .1801. (R Ex. 10) On April 26, 2018, Respondent also imposed a penalty of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27D .0304. (R Ex. 10) And on April 26, 2018, Respondent also imposed a penalty of Three Thousand Dollars (\$3,000.00) for violation of 10A NCAC 27E .0101. (R Ex. 10)

32. Each of these violations were appropriately cited as Type A1 violations. As concluded above, Respondent's citations of this Type A1 violation are supported by clear and convincing evidence and Petitioner actually committed the acts for which the fine or penalty was imposed. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by rule or law when citing these Type A1 violations.

33. A Type A1 violation requires the assessment of an administrative penalty. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when assessing an administrative penalty against Petitioner in the amount of Three Thousand Dollars (\$3,000.00) for each of the three violations cited above. The amount of these penalties was reasonable considering the facts and circumstances justifying Type A1 penalties.

Revocation of Licenses for Four Other Facilities

34. It is clear that N.C. Gen. Stat. § 122C-23(a) provides that a facility is prohibited from providing services unless duly licensed. N.C. Gen. Stat. § 122C-23(e) states that the license "shall expire at the end of the calendar year."

35. N.C. Gen. Stat. § 122C-23(e) also provides that a provisional license may be granted to a provider who is "temporarily unable to comply with a rule." The provisional license is for a period not to exceed six months, and during that time the licensee is to correct the noncompliance issue. Petitioner was quite capable of correcting the noncompliance issue, even within perhaps 24 hours by hand delivery. Petitioner has presented unrefuted testimony and documentation by clear and convincing evidence that the re-enrollment should be allowed.

36. It would be a miscarriage of justice for the licenses to be revoked under the facts and circumstances of this contested case when, based on the evidence before this tribunal, Petitioner made a good faith effort to comply with the requirements to renew those licenses. She

had never been tardy before in renewing. There is nothing in the history of these facilities of record which would tend to show that she would have been unable to comply with licensing. In fact, just the opposite is true. There is nothing to show that these facilities presented an immediate threat to the health and safety of the individuals in those facilities. Petitioner would have been able to correct the non-compliance very quickly. And Respondent had not always been prompt in getting the licenses to the providers. Even if no other remedy was presented to Petitioner, she should have been granted a temporary license until the renewals were processed.

37. It has been found that the Level IV facility was a failure; however, that does not comport with the history of the other four facilities owned by Petitioner. While the decision in the Level IV facility may have prospective ramifications, it would be improper to apply those facts to the other four facilities.

38. The competent clear and convincing evidence has shown that Petitioner's licenses should not have been revoked for the following renewal licenses at issue: MHL # 004-33; MHL # 004-040; MHL # 077-077; and MHL # 047-091.

39. In failing to allow Petitioner's applications to be processed, Respondent prejudiced Petitioner's rights, acted erroneously, failed to use proper procedure, and failed to act as required by law or rule.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to summarily suspended Petitioner's license to operate on April 11, 2018, suspended Petitioner's admissions on April 26, 2018, revoked Petitioner's license to operate the Facility on June 1, 2018, and the imposition of three Type A1 penalties on April 26, 2018 should be **UPHELD**.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to deny Petitioner's renewal of facility licenses MHL # 004-33; MHL # 004-040; MHL # 077-077; and MHL # 047-091 is **REVERSED**.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

SO ORDERED, this the 22nd day of August, 2019.



Donald W Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

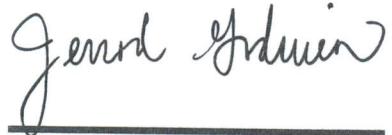
The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 22nd day of August, 2019.



Jerrod Godwin
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